VENTURING INTO *HOBBY LOBBY*'S MINEFIELD: AN EXAMINATION OF CORPORATE RELIGIOUS FREEDOM, SAME-SEX SPOUSES, AND ERISA PLANS

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I. INTRODUCTION

This note will argue that for-profit corporations with religious objections to same-sex marriage will be unable to use the Religious Freedom Restoration Act of 1993 (RFRA) to deny benefits to employees' same-sex spouses if the corporation elects to provide opposite-sex spouses with benefits under plans covered by the Employee Retirement Income Security Act of 1974 (ERISA). If requiring for-profits to provide benefits to same-sex spouses is a substantial burden on the corporation's free exercise of religion, to survive a challenge under the RFRA, the government must demonstrate that the burden on the person's free exercise is in furtherance of a compelling governmental interest, and is the least restrictive means of furthering that interest.[1] Although the Court likely would conclude that the for-profits' sincerely held religious beliefs have been burdened, this note will contend that there is no less restrictive way of furthering the government's interest in eradicating sexual orientation discrimination.

Part II will discuss the evolution of the balancing test found in the RFRA. It will start with the test's origination in *Sherbert v. Verner*,[2] the test's rejection in *Employment Division v. Smith*,[3] and the rejection of *Smith* and codification of the *Sherbert* balancing test adopted by the RFRA. This part will also discuss the protection afforded to for-profit corporations under the RFRA granted by the Court in *Burwell v. Hobby Lobby Stores, Inc.*,[4] and discuss arguments for and against granting religious protection to for-profit corporations.

Part III will discuss *United States v. Windsor*[5] and its effect on the definition of "spouse" for purposes of federal law. This part will also

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[1] 42 U.S.C. § 2000bb (a) (2012).

[2] 374 U.S. 398 (1963).

[3] 494 U.S. 872 (1990).

[4] 134 S. Ct. 2751 (2014).

[5] 133 S. Ct. 2675 (2013).

briefly explain the latest guidance federal agencies have given regarding the definition of "spouse" after *Obergefell v. Hodges*.[6]

Part IV will detail the different plans under ERISA and indicate which plans require that private employers provide benefits for spouses. This part will also discuss Title VII and the Equal Employment Opportunity Commission's (EEOC) changing stance on sexual orientation discrimination and a statute recently introduced by Congress to combat sexual orientation discrimination.

Drawing on the information presented in Part II, Part III, and Part IV, Part V will assume that the federal government has taken the position that private employers who elect to provide spousal benefits under plans covered by ERISA must provide those benefits to opposite-sex spouses and same-sex spouses on the same terms. This part will then confront whether closely held for-profit corporations could successfully challenge the hypothetical provision's constitutionally under the RFRA, and ultimately conclude that the challenge would fail.

II. THE RELIGIOUS FREEDOM RESTORATION ACT OF 1993 (RFRA)

The protection of the free exercise of religion has a long history in the United States. This history includes a number of different tests developed by the Supreme Court and codified by Congress to determine whether a person's religious freedom has been abridged. Currently, the Court uses the congressionally mandated test found in the RFRA to determine whether a person's religious beliefs should be afforded protection from governmental regulation.[7] This section will begin with an overview of the development of the RFRA and end with a discussion of *Hobby Lobby* and whether it was correctly decided.

A. The Evolution of the RFRA

When determining whether a challenged government action violates the First Amendment's free exercise clause, one of the most frequently cited cases by the Court is *Sherbert v. Verner*.[8] In *Sherbert*, the Court held that an employee, who was fired for refusing to work on the Sabbath of her faith, could not be denied unemployment benefits by the state of South Carolina, based on the State's contention that her "refusal to work on Saturdays . . .

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[6] 135 S. Ct. at 2599 (2015).

[7] 42 U.S.C. § 2000bb (a) (2012).

[8] 374 U.S. 398 (1963). *See, e.g.*, *Holt v. Hobbs*, 135 S. Ct. 853 (2015); *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418 (2006); *Hobbie v. Unemployment Appeals Com.*, 480 U.S. 136 (1987); *Thomas v. Review Bd. of Ind. Emp't Sec. Div.*, 450 U.S. 707 (1981).

disqualified her for failure to accept suitable work."[9] Reaching this decision, the Court employed a balancing test in which the State had the burden of establishing that the substantial infringement on the employee's right to free exercise was justified by a compelling state interest.[10]

Applying the test, the Court first looked at whether a substantial burden was placed on the employee.[11] The employee had a choice—she could obey her religion and forfeit unemployment benefits or she could abandon her religion in order to maintain employment.[12] The Court found this choice to be a substantial burden on the woman, holding that "to condition the availability of benefits upon this appellant's willingness to violate a cardinal principle of her religious faith effectively penalizes the free exercise of her constitutional liberties."[13]

Next, the Court required that the State establish a compelling interest to justify the substantial infringement on the employee's First Amendment right.[14] To meet this prong, the Court stated that a mere "rational relationship to some colorable state interest" would not suffice, rather "only the gravest abuses, endangering paramount interests, [would] give occasion for permissible limitation."[15] And here, the Court held that no such "danger of abuse" was present.[16]

Finding the absence of a compelling interest, the Court distinguished its decision from *Braunfeld v. Brown.*[17] In *Braunfeld*, seven employees of a large department store disputed the validity of their convictions under South Carolina's "Sunday Closing Laws" for selling prohibited goods on Sunday.[18] The employees argued that, as Orthodox Jewish merchants who rested on Saturday, closing both Saturday and Sunday threatened the vitality of their business.[19] The Court held that although the laws made the employees' practice of religion more expensive, the State's strong interest in maintaining one uniform day of rest for all outweighed the employees' burden, and without creating administrative difficulties and competitive advantages, the best way to serve the State's interest was to declare Sunday

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[9] *Sherbert*, 374 U.S. at 399-402.
[10] *Id.* at 403.
[11] *Id.*
[12] *Id.* at 403-04.
[13] *Id.* at 404-06.
[14] *Id.* at 406.
[15] *Sherbert,* 374 U.S. at 406 (quoting Thomas v. Collins, 323 U.S. 516, 530 (1945)).
[16] *Id.* at 406-407.
[17] *Id.* at 408-09 (citing Braunfeld v. Brown, 366 U.S. 599 (1961)).
[18] *Braunfeld*, 366 U.S. at 600.
[19] *Id.*

as the day of rest.[20] Distinguishing its decision, the *Sherbert* Court concluded that, unlike in *Braunfeld*, the State had failed to provide a strong state interest to justify the denial of the employees' benefits, and thus held unconstitutional the conditioning of the disbursement of benefits on the employees' abandonment of their religious convictions.[21]

Almost ten years later, the Court applied the *Sherbert* analysis in *Wisconsin v. Yoder*, in which parents in an Amish Community challenged the State's compulsory school attendance law, alleging that the law violated their First and Fourteenth Amendment rights.[22] The parents did not want to send their children to public school, but instead wished to homeschool their children on how to be members of their rural community.[23] The Court agreed with the Amish community, finding the burden substantial because compulsory education would "endanger if not destroy the Amish's religious belief."[24] Although action that is adverse to one's religious convictions is not "totally free from legislative restrictions," the Court held that forcing Amish children to attend school for two years because of the State's interest in preparing citizens to "participate effectively and intelligently in our open political system" is not enough to overcome the substantial burden on the Amish community.[25]

Years later, the Court declined to apply the *Sherbert* balancing test when it decided *Employment Division v. Smith*.[26] In *Smith*, Oregon denied two Native Americans unemployment benefits after they had been fired for work related misconduct.[27] The former employees were terminated for ingesting peyote for religious purposes at a religious ceremony, violating an Oregon statute that prohibited the use of peyote with "no exception for sacramental use."[28] Rejecting the *Sherbert* balancing test, the Court instead asked whether prohibiting the exercise of religion was the statute's objective or simply an incidental effect, and held that "if prohibiting the exercise of religion is not the object . . . but merely the incidental effect of a generally applicable and otherwise valid provision, the First Amendment has not been offended."[29] Because the Oregon statute was a valid, religion-

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[20] *Id.* at 608-609 (Requiring exemptions for Sabbatarians, while theoretically possible, appeared to present an administrative problem of such magnitude, or to afford the exempted class so great a competitive advantage, that such a requirement would have rendered the entire statutory scheme unworkable.)

[21] *Sherbert*, 374 U.S. at 408-09 (citing Braunfeld v. Brown, 366 U.S. 599, 605 (1961)).

[22] Wisconsin v. Yoder, 406 U.S. 205, 207-10 (1972).

[23] *Id.*

[24] *Id.* at 219.

[25] *Id.* at 221 (citing Braunfeld v. Brown, 366 U.S. 599, 603 (1961).

[26] 494 U.S. 872 (1990).

[27] *Id.* at 874.

[28] *Id.* at 876 (citing Smith v. Employment Div., 763 P. 2d 146, 148 (1988)).

[29] *Id.* at 877-79.

neutral law prohibiting conduct that states are free to regulate, the Court held it constitutional to deny unemployment compensation when the employees' dismissal results from ingesting peyote for religious purposes.[30]

The *Smith* majority spent considerable time explaining its reasons for holding the *Sherbert* test inapplicable to free exercise challenges.[31] Of chief concern to the Court was hindering the government's power to administer "generally applicable prohibitions of socially harmful conduct" by making that ability dependent upon "measuring the effects of a governmental action on a religious objector's spiritual development."[32] The Court found that applying the most exacting scrutiny in this context—which they characterized as "a private right to ignore generally applicable laws"—to be inappropriate because such scrutiny is reserved for constitutional norms, such as the "equality of treatment and unrestricted flow contending speech."[33] Moreover, the Court stated that a compelling state interest analysis would result in the Court questioning the "centrality" of religious beliefs, a practice that the Court has repeatedly held to be inappropriate.[34]

The decision reached in *Smith* was not welcomed by the legal community, but was instead seen as a "dramatic attack on religious liberty."[35] As a result, the Religious Freedom Restoration Act of 1993 (RFRA) was passed, essentially overturning the Court's holding in *Smith* and reinstating the test employed in *Sherbert* and *Yoder*.[36] Under the RFRA,

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[30] *Id.* at 882, 890.

[31] *Id.* at 882-890.

[32] Employment Div., Dep't of Human Res. of Oregon v. Smith, 494 U.S. 872, 884-85 (1990) (quoting *Lyng v. Northwest Indian Cemetery Protective Assn*, 485 U.S. 439, 449-451 (1988)).

[33] *Employment Div., Dep't of Human Res. of Oregon*, at 885-86. (O'Connor, J., concurring) (Justice O'Connor rejected this notion, arguing that the text of the Constitution is clear—"an individual's free exercise of religion is a preferred constitutional activity . . . . The First Amendment unequivocally makes freedom of religion, like freedom from race discrimination and freedom of speech, a 'constitutional nor[m],' not an 'anomaly.'"). The majority responded that strict scrutiny is reserved for classifications—based on race, the content of speech, or religion—but that laws neutral on their face to race, religion, or speech that have the *effect* of disadvantaging a particular group gave never received strict scrutiny.

[34] *Id.* at 886-87 ("Repeatedly and in many different contexts, we have warned that courts must not presume to determine the place of a particular belief in a religion or the plausibility of a religious claim."); *see, e. g.,* Thomas v. Review Bd. of Indiana Employment Security Div., 450 U.S. 707, 716, (1981); Presbyterian Church in U. S. v. Mary Elizabeth Blue Hull Memorial Presbyterian Church, 393 U.S. 440, at 450; Jones v. Wolf, 443 U.S. 595, 602-606 (1979); United States v. Ballard, 322 U.S. 78, 85-87 (1944).")

[35] James M. Oleske, Jr., *The Evolution of Accommodation: Comparing the Unequal Treatment of Religious Objections to Interracial and Same-Sex Marriages*, 50 HARV. C.R.-C.L. L. REV. 99, 125 (Winter 2015).

[36] *Id.* at 125-26.

the "[g]overnment shall not substantially burden a person's exercise of religion," unless the government can demonstrate that the burden "(1) is in furtherance of a compelling government interest; and (2) is the least restrictive means of furthering that compelling governmental interest."[37] Although in 1997 the Supreme Court held that Congress overstepped its authority under Section Five of the Fourteenth Amendment when it enacted the RFRA and thus held it inapplicable to the states, the RFRA still controls federal action.[38] In addition, nineteen states have since enacted their own RFRAs.[39]

B. Hobby Lobby and the RFRA

In the landmark case of *Burwell v. Hobby Lobby Stores Inc.*,[40] the Court was tasked with determining whether for-profit corporations should be afforded protection under the RFRA.[41] The action began when three for-profit corporations sued the U.S. Department of Health and Human Services (HHS) and other federal agencies and officials, challenging the contraceptive mandate found in the Patient Protection and Affordable Care Act of 2010 (ACA).[42] The for-profits objected to the mandate on the grounds that it violated their religious freedom protected by the RFRA and the Equal Protection Clause.[43] Specifically, because the for-profits' held the religious belief that life begins at conception, they could not provide employees with coverage of four FDA-approved contraceptives that operate after the fertilization of an egg without substantially burdening their faith.[44] The Court accepted the for-profits' argument under the RFRA and held HHS's mandate unconstitutional because it substantially burdened the closely held for-profits' exercise of religion and was not the least restrictive means of serving the government's compelling interest.[45]

The RFRA controls government actions that "substantially burden a *person's* exercise of religion;"[46] however, the Act fails to define "person."[47] Thus, to reach a decision, the Court first had to decide whether for-profit corporations are "persons" under the RFRA.[48] To resolve this question, the

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[37] 42 U.S.C. § 2000bb-1 (b) (2012).
[38] Oleske, *supra* note 35, at 125-6; *see* City of Boerne v. Flores, 521 U.S. 507 (1997) (holding RFRA unconstitutional as applied to states).
[39] *Id.*
[40] 134 S. Ct. 2751 (2014).
[41] *Id.* at 2766.
[42] *Id.* at 2764-66.
[43] *Id.*
[44] *Id.*
[45] *Id.*
[46] 42 U.S.C. § 2000bb-1 (a), (b) (2012).
[47] *Burwell*, 134 S. Ct. at 2768.
[48] *Id.* at 2764-66.

Court looked to the Dictionary Act,[49] which states that "in determining the meaning of any Act of Congress, unless context indicates otherwise" the word "person" should be read to "include *corporations*, companies, associations, firms, partnerships, societies, and joint stock companies, as well as individuals."[50] Therefore, finding no evidence that Congress intended otherwise, the Court held that corporations are "persons" and are thus afforded protection under the RFRA.[51]

After establishing corporate religious protection under the RFRA, the Court next decided whether requiring the for-profits to provide contraceptives would violate the sincerely held religious beliefs of the companies' owners.[52] Because the named for-profits were closely held, owned, and controlled by a single family with sincere religious beliefs,[53] the Court held that requiring the for-profits to provide contraceptives to their female employees would substantially burden the for-profits' beliefs.[54] Plus, if the for-profits chose not to comply with the ACA, there were huge financial penalties.[55] And, although alternatively the for-profits could drop health coverage for employees altogether, the Court ultimately concluded that by dropping coverage, the for-profits would likely lose skilled workers who otherwise would have worked for the businesses had the corporations provided coverage.[56]

The Court assumed that the government's interest in providing contraceptives to employees was compelling, but determined that there were less restrictive means available to further the government's agenda.[57] One proposal was for the government to absorb the cost of providing contraceptives to employees whose employers objected to providing contraceptives based on their sincerely held religious beliefs; but the Court

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[49] *Id.*

[50] 1 U.S.C. § 1 (1947).

[51] *Burwell*, 134 S. Ct. at 2769) (emphasis added).

[52] *Id.* at 2770.

[53] *Id.* at 2774-75.

[54] *Id.*

[55] Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751, 2775-76 (2014). ("Under 26 U.S.C. §4980D, the companies would be taxed $100 a day for noncompliance with the mandate. The Court estimated that this would amount to a bill of $475 million per year for $33 million per year for Conestoga, and $15 million per year for Mardel. As an alternative, the companies could drop health insurance altogether, forcing eligible employees to obtain coverage through the programs established by the ACA, which would result in a $2,000 penalty per employee per year. The Court estimated the penalties totaling at $26 million for Hobby Lobby, $1.8 million for Conestoga, and $800,000 for Mardel.") (citations and quotations omitted).

[56] *Id.* at 2776-77.

[57] *Id.* at 2780-81.

ultimately rejected this proposition, finding a better alternative.[58] Instead, because HHS already had an "accommodation for nonprofit organization[s] with religious objections,"[59] and the same alternatives could feasibly be made available to for-profit corporations, the Court held that there were less restrictive means available: to allow for-profit corporations to enjoy the same accommodations provided to non-profits.[60] The Court has now granted certiorari on whether even this accommodation for nonprofits is unconstitutional under the RFRA and will answer the question in the consolidated case, *Zubik v. Burwell*.[61]

Justice Ginsburg wrote a powerful dissent in *Hobby Lobby*, accusing the majority of coming to the overly broad and sweeping holding that the "RFRA demands accommodation of a for-profit corporation's religious beliefs no matter the impact that accommodation may have on third parties who do not share the corporation owners' religious faith."[62] In her dissent, Justice Ginsburg critiqued the Court's finding that the companies were substantially burdened and rejected the Court's determination that less restrictive means were available.[63]

Of particular importance, Justice Ginsburg rejected the Court's conclusions that a corporation is a "person" under the RFRA.[64] Rather than turning to the Dictionary Act, which Justice Ginsburg highlighted only controls when "context does not indicate otherwise,"[65] she directed attention to the pre-*Smith*[66] "free-exercise caselaw," which offers "no support for the notion that free exercise rights pertain to for-profit corporations."[67] She remarked, "[t]he absence of such precedent is just what one would expect, for the exercise of religion is characteristic of natural

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[58] *Id.* at 2781 ("[The] RFRA . . . in some circumstances require the government to expend additional funds to accommodate citizens' religious beliefs.") (citing 42 U.S.C. § 2000cc-3(c) (2012)).

[59] *Id.* at 2782 (quoting 45 CFR §147.131(c)(2); 26 CFR §54.9815-2713A(c)(2)) (citation omitted).

[60] *Id.*

[61] Zubik v. Burwell, ___U.S.___ 136 S. Ct. 444 (2015), *sub nom* Geneva Coll. v. Sec'y U.S. Dep't of Health & Human Servs., 778 F.3d 422 (3d Cir. 2015). The Supreme Court heard oral argument on the issue of whether the "accommodation" is a substantial burden on nonprofits' religious exercise, in violation of RFRA. *See* Oral Argument, Zubik v. Burwell, ___U.S.___, 136 S. Ct. 444 (2015) (No. 14-1418), http://www.supremecourt.gov/oral_arguments/argument_transcripts/14-1418_1bn2.pdf.

[62] *Burwell*, 134 S. Ct. at 2787 (Ginsburg J., dissenting).

[63] *Id.* at 2798-801.

[64] *Id.* at 2793-4.

[65] *Id.* at 2793-4 (citing 1 U.S.C. § 1) (quotations omitted).

[66] 494 U.S. 872 (1990).

[67] *Burwell*, 134 S. Ct. at 2793-94 (Ginsburg, J., dissenting) (quoting Gilardi v. United States HHS, 733 F.3d 1208, 1212 (D.C. Cir. 2013)).

persons, not artificial legal entities."[68] Justice Ginsburg drew many distinctions between for-profit corporations and natural persons, churches, and non-profit organizations to support her argument that the latter named beings are afforded protection because of characteristics that corporations do not have nor are they capable of having.[69]

Specifically, her dissent argued that corporations are different than individuals because, unlike natural persons, for-profits "have no consciences, no beliefs, no feelings, no thoughts, no desires[;]"[70] rather, corporations are "artificial being[s], invisible, intangible, and existing only in contemplation of law."[71] And for-profits differ from churches and non-profits because of the composition of its members, which Justice Ginsburg contended is why churches and non-profits receive protection—the First Amendment protects religious organizations in order to protect the natural persons who derive meaning from participating in a community that shares the same religious beliefs.[72] As Justice Ginsburg reasoned, it is unlikely that for-profits are comprised of employees who all subscribe to the same faith, and for-profits do not exist to protect or promote the individual religious beliefs of its employees; instead, corporations employ individuals, regardless of whether they share common religious values, in order to use their labor for profit.[73]

C. Arguments for and Against Personhood of For-Profit Corporations Under the RFRA

Was the *Hobby Lobby* majority correct in granting closely held for-profit corporations protections under the RFRA, or are Justice Ginsburg's arguments against corporate personhood under the RFRA more compelling? Corporations are protected against unreasonable searches and seizures under the Fourth Amendment.[74] Corporations may engage in protected speech as persons under the First Amendment.[75] And now, corporations may deny employees contraception based on religious

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[68] *Id.* at 2794.
[69] *Id.* at 2794-6.
[70] *Id.* at 2794 (Ginsburg, J., dissenting) (citing Citizens United v. Fed. Election Comm'n, 558 U.S. 310, 466 (2010)).
[71] *Id.* (citing Trustees of Dartmouth Coll. v. Woodward, 17 U.S. 518 (1819)).
[72] *Id.* (citing Corp. of Presiding Bishop of Church of Jesus Christ of Latter-day Saints v. Amos, 483 U.S. 327, 342 (1987) (Brennan, J., concurring)).
[73] Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751, 2794-97 (2014) (Ginsburg, J., dissenting) (citing Gilardi v. U.S. Dep't of Health & Human Servs., 733 F.3d 1208, 1242) (Edwards, J., concurring in part and dissenting in part)).
[74] Hale v. Henkel, 201 U.S. 43, 76 (1906) (holding corporations have Fourth Amendment protections against unreasonable searches and seizures).
[75] *See* Citizens United v. Fed. Election Comm'n, 558 U.S. 310 (2010) (holding speech cannot be suppressed based on corporate identity).

objection under the RFRA.[76] The question remains: has the Court granted for-profits too many protections?[77]

In support of the *Hobby Lobby*[78] decision, some contend that for-profits are rightly protected under the RFRA because modern day corporations' business purpose and philanthropic goals have become integrated.[79] This "integralist" perspective views religion as a "comprehensive system" that is essentially present in all areas of a person's life rather than an "isolated aspect of human existence."[80] It could be said that present day corporations adopt an integralist view of business and religion because "moral considerations, and not just profit maximization, have played an increasingly visible and contested role in the marketplace."[81] In support of this contention, it should be noted that "many for-profit businesses pursue charitable or social endeavors; many investors and investment funds cater to morally and socially conscious aims; and many new corporate forms or governing rules recognize the role of pursuits beyond narrow profit seeking."[82] As Justice Alito observed, "modern corporate law does not require for-profit corporations to pursue profit at the expense of everything lse, and many do not do so."[83]

However, it should be noted that allowing closely held for-profit corporations exemptions based on religious objection will impose burdens on third parties.[84] Specifically, according to Caroline Corbin, as for-profits seek exemptions from the law based on religious objection, "corporate religious liberty will come at the expense of employees' individual religious liberty."[85] Corbin contends that by granting corporate religious liberty, all employee protections are left vulnerable to religious exemptions, exacerbating the power imbalance between corporations and employees.[86]

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[76] Matthew A. Melone, *Corporations and Religious Freedom: Hobby Lobby Stores—A Missed Opportunity to Reconcile a Flawed Law with a Flawed Health Care System*, 48 IND. L. REV. 461, 487 (2015) (discussing the history of the Court's recognition of corporations as persons).

[77] This article does not take a position as to whether the Court wrongly granted corporations protection under the RFRA, but instead will highlight different arguments for against the Court's holding in *Hobby Lobby*.

[78] 134 S. Ct. 2751 (2014).

[79] Paul Horwitz, *The Supreme Court 2013 Term: The Hobby Lobby Moment*, 128 HARV. L. REV. 154, 180-81 (2014).

[80] *Id.* at 180.

[81] *Id.* at 181.

[82] *Id.*

[83] *Id.*

[84] Oleske, *supra* note 35, at 131-32.

[85] Caroline Mala Corbin, *Symposium: Corporate Religious Liberty*, 30 CONST. COMMENT. 277, 304 (2015) (questioning other potential healthcare requirements that corporations may seek to exempt themselves based on religious objection).

[86] *Id.* at 305-06.

She stresses that by enabling corporations to act according to their conscience, it will make it harder for employees to act according to theirs.[87]

In response, some argue that although it may be an inconvenience to employees whose employers act according to their corporate conscience, society should be equally concerned with the inconvenience to and burden on corporations who must sacrifice their religious beliefs in order to accommodate employees.[88] Professor Laycock proposes that when considering the scope of any right to deny same-sex couples service, the analysis must focus on both the harm to the couple *and* the harm to the merchant coerced to provide service.[89] In his view, a merchant's moral integrity outweighs any inconvenience to the couple that might result from obtaining the same service from another merchant.[90] He states that "[r]equiring a merchant to perform services that violate his deeply held moral commitments is far more serious, different in kind and not just in degree, from mere inconvenience."[91]

Conversely, some contend that a corporation's "deeply held religious beliefs" cannot be violated because corporations lack the human attributes that justify the protection of individuals' religious liberty.[92] Caroline Corbin contends that there are two justifications for protecting individuals' religious liberty: the secular justification and religious justification.[93] Under the secular justification, society preserves individual autonomy because "compelling people to act contrary to their conscience may cause dignitary harm."[94] And the religious justification is based on the desire to allow religious people to follow their obligations in order to avoid spiritual harm.[95] Persons have the power to love or fear God, and the ability to feel guilt or shame for acting contrary to their conscience.[96] Corporations, on the other hand, cannot have emotional responses because they do not have souls or feelings, and as Corbin contends, are created solely to facilitate economic growth.[97]

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[87] *Id.* at 307.
[88] Oleske, *supra* note 35, at 130-32.
[89] *Id.* at 129.
[90] *Id.*
[91] *Id.*
[92] Corbin, *supra* note 85, at 284-87.
[93] *Id.*
[94] *Id.* at 285.
[95] *Id.* at 284.
[96] *Id.* at 286.
[97] *Id.* at 284-87; *see also* Melone, *supra* note 76, at 488-90 (discussing why corporations do not have "natural rights" which he proposes as a justification for protecting individuals rights of free exercise of religion because it is a fundamental right).

Similarly, many justifications for protecting churches' religious liberty do not support the protection of for-profits' religious liberty. Corbin contends that unlike churches, corporations focus on the corporate conscience, not individual.[98] Further, others argue that religious organizations exist to advance the interests of members drawn from one religious community who subscribe to the same religious faith and join together for a common religious purpose.[99] And as Justice Ginsburg pointed out in her dissenting opinion in *Hobby Lobby*, it is unlikely that employees of for-profits belong to the same religion or are joined under the for-profit to promote their individual interests; rather, individuals seek employment for compensation and for-profits employ individuals in order to turn labor into profit.[100]

As it follows, some contend that the majority in *Hobby Lobby*[101] drew an inaccurate distinction between churches and for-profits when it reasoned that non-profits and for-profit corporations are similar except that for-profits also make money.[102] For-profit corporations are comprised of shareholders, investors, employees, and officers, whose purposes are to sustain the operation of the corporation and generate a profit.[103] These members are not brought together for a "religious value-based mission;" rather, they likely have diverse beliefs and are a part of the corporation for financial gain.[104] The primary purpose of a corporation is to make money, not to practice and promulgate religion.[105] As some have more frankly stated, if a for-profit corporation's purpose was not profit, it would be a non-profit.[106]

III. *WINDSOR* AND THE CHANGING DEFINITION OF "SPOUSE"

This section will begin with a brief discussion of *United States v. Windsor.*[107] Next, it will outline various agency responses to the decision, focusing on federal agencies' newly adopted definition of "spouse." Lastly,

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[98] Corbin, *supra* note 85, at 280-90.

[99] Patrick J. McNulty & Adam D. Zenor, *Corporate Free Exercise of Religion and the Interpretation of Congressional Intent: Where Will it End?*, 39 S. ILL. U. L.J. 475, 495 (2015).

[100] Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751, 2794-97 (2014).(Ginsburg J., dissenting) (citing Gilardi v. U.S. Dep't of Health & Human Servs., 733 F.3d 1208, 1242) (Edwards, J., concurring in part and dissenting in part)).

[101] 134 S. Ct. 2751 (2014).

[102] McNulty, *supra* note 99, at 495-96.

[103] *Id.* at 495-96.

[104] *Id.* at 496-97.

[105] Corbin, *supra* note 85, at 293.

[106] *Id.*

[107] 133 S. Ct. 2675, 2695 (2013) (holding DOMA unconstitutional).

the section will touch on the working definition of "spouse" after *Obergefell v. Hodges*.[108]

A. United States v. Windsor

Section 3 of the Defense of Marriage Act (DOMA) amended the Dictionary Act to define "marriage" and "spouse" as explicitly excluding same-sex partners and spouses as the terms appear in federal statutes.[109] Although this definition did not by its terms restrict State's recognition of same-sex marriages or civil unions, it did control over 1,000 federal rules and a number of federal regulations in which marital status is addressed as a matter of federal law.[110]

In 2013, the constitutionality of Section 3 of DOMA was successfully challenged in *United States v. Windsor*. Edith Windsor and Thea Spyer were lawfully married in Canada in 2007, but they continued to be domiciled in New York City, where Spyer died in 2009. [111] When Spyer passed away, she left her entire estate to Windsor; but because the definition of "spouse" under Section 3 of DOMA did not include same-sex spouses, Windsor was unable to claim the estate tax exemption for surviving spouses.[112] Windsor paid the tax and subsequently filed suit challenging the constitutionality of Section 3 of DOMA.[113] The Court found strong evidence that Section 3 of DOMA was motivated by an improper purpose—"to impose a disadvantage, a separate status, and so a stigma upon all who enter same-sex marriages"[114]—and thus held that the Act

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[108] 135 S. Ct. 2584 (2015).

[109] 1 U.S.C. § 7 (1996) ("In determining the meaning of any Act of Congress, or of any ruling, regulation, or interpretation of the various administrative bureaus and agencies of the United States, the word "marriage" means only a legal union between one man and one woman as husband and wife, and the word "spouse" refers only to a person of the opposite sex who is a husband or a wife."); *but see* United States v. Windsor, 133 S. Ct. 2675, 2695 (2013) (holding that Section 3 of DOMA is unconstitutional as a deprivation of the equal liberty of persons protected by the Fifth Amendment). However, DOMA governed the interpretation of these words in ERISA itself, DOMA did not control the definition of these terms as they were found in ERISA-qualified plans. *Union Sec. Ins. Co. v. Blakeley*, 636 F.3d 275 (6th Cir. 2011) (holding that definition of "domestic partner" is determined preferably by reference to the plan language of the ERISA-governed life insurance plan, not the federal common-law definition of "domestic partner").

[110] United States v. Windsor, 133 S. Ct. 2675, 2683 (2013).

[111] *Id.* at 2682.; New York recognized same-sex marriages performed elsewhere. *Id.* at 2689.

[112] *Id.* at 2683.

[113] *Id.*

[114] *Id.* at 2693

violated the Due Process and Equal Protection Clauses of the Fourteenth Amendment.[115]

Central to the holding was the Court's position that states have the power to define marriage as including same-sex spouses and Congress cannot prohibit states from choosing to honor and dignify those relationships.[116] The State sought to eliminate inequality, while "DOMA [wrote] inequality into the entire United States Code.[117]

The Court found that DOMA's primary purpose was to "identify a subset of state-sanctioned marriages and make them unequal."[118] And, by doing so, the Act was inflicting upon same-sex couples and their families both dignitary harm and financial harm.[119] As a result of the Act, same-sex couples were forced to live as married for purposes of state law but unmarried for purposes of federal law.[120] This created instability and unpredictability and inflicted unreasonable financial burdens on those couples.[121] This disjointed status imposed by the Act not only financially burdened same-sex couples, but also financially harmed the couples' children. [122]

The Act also undermined the significance of marriage, essentially treating same-sex marriages as "second-tier marriage[s]."[123] The Court found that it divested the couples of the duties and responsibilities essential to married life, demeaned same-sex couples, and told those couples and the public that same-sex marriages were "unworthy of federal recognition."[124] By doing so, the Act humiliated "tens of thousands of children" of same-

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[115] United States v. Windsor, 133 S. Ct. 2675, 2695 (2013).
[116] *Id.* at 2691-93.
[117] *Id.* at 2694.
[118] *Id.*
[119] *Id.* at 2693-95.
[120] *Id.* at 2694.
[121] Windsor v. United States, 133 S. Ct. 2675, 2694 (2013) ("It prevents same-sex married couples from obtaining government healthcare benefits they would otherwise receive. It deprives them of the Bankruptcy Code's special protections for domestic-support obligations. It forces them to follow a complicated procedure to file their state and federal taxes jointly. It prohibits them from being buried together in veterans' cemeteries.") (citations omitted).
[122] *Id.* at 2695 ("It raises the cost of health care for families by taxing health benefits provided by employers to their workers' same-sex spouses. And it denies or reduces benefits allowed to families upon the loss of a spouse and parent, benefits that are an integral part of family security.") (citations omitted).
[123] *Id.* at 2694.
[124] *Id.* at 2694-95.

sex couples and hindered the children's ability to understand the "integrity and closeness of their own family."[125]

Because DOMA's purpose was to injure the class that the State sought to protect and that harm to same-sex couples and their families was so egregious, the Court held Section 3 of DOMA unconstitutional under the Fourteenth Amendment.[126] As a result, lawful same-sex marriages had to be recognized for purposes of federal law.[127]

B. Response to Windsor

In response to *Windsor*, the Department of Labor issued Technical Release No. 2013-04 on September 18, 2013, modifying the definition of "spouse" and "marriage" to include same-sex marriages for purposes of federal law.[128] According to the Technical Release, "spouse" now "refer[s] to any individuals who are lawfully married under any state law, including individuals married to a person of the same sex who were legally married in a state that recognizes such marriages, but who are domiciled in a state that does not recognize such marriages;"[129] and "marriage" encompasses "a same-sex marriage that is legally recognized as a marriage under any state law."[130]

The Internal Revenue Service (IRS) also quickly responded to *Windsor*, issuing Revenue Ruling 2013-17 on August 29, 2013. Consistent with

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[125] *Id.* ("The law in question makes it even more difficult for the children to understand the integrity and closeness of their own family and its concord with other families in their community and in their daily lives.")

[126] *Id.* at 2695-96.

[127] Windsor v. United States, 133 S. Ct. 2675, 2695-96 (2013)

[128] U.S. DEP'T OF LABOR, TECHNICAL RELEASE NO. 2013-14, GUIDANCE TO EMPLOYEE BENEFITS PLANS ON THE DEFINITION OF "SPOUSE" AND "MARRIAGE" UNDER ERISA AND THE SUPREME COURT'S DECISION IN UNITED STATES V. WINDSOR (2013).

[129] *Id.*

[130] *Id.* (emphasis added). However, the Technical Release clarified that "the terms 'spouse' and 'marriage[]'. . .do not include individuals in a formal relationship recognized by a state that is not denominated a marriage under state law, such as a domestic partnership or a civil union, regardless of whether the individuals who are in these relationships have the same rights and responsibilities as those individuals who are married under state law." *Id.* On February 25, 2015, the Department of Labor released a Final Rule to officially hold that the definition of "spouse" under the Federal Medical Leave Act include same-sex spouses who lawfully celebrated their marriage in a state which recognizes same-sex marriages ("place of celebration" rule), updating the old rule which did not recognize same-sex marriages if the couple was residing in a state that did not recognize same-sex marriages ("state of residence" rule). 29 C.F.R. §825.102 (2015). *Id.*; *But see infra* note 134.

Windsor, the IRS announced recognition of same-sex marriages, concluding that, for federal income tax purposes, the terms "husband and wife," "husband," and "wife" should be read to include same-sex spouses.[131] The IRS also concluded that "[g]ender-neutral terms in the Code that refer to marital status, such as 'spouse' and 'marriage' include, respectively: (1) an individual married to a person of the same sex if the couple is lawfully married under state law, and (2) such a marriage between individuals of the same sex."[132]

The IRS highlighted several justifications for broadening the definitions of "spouse" and "marriage" and thus ensuring that similarly situated same-sex couples and opposite-sex couples are treated in the same manner. [133] One of which was the agency's interest in fostering fairness.[134] Specifically, the IRS did not want to unduly burden same-sex couples by forcing them to comply with a special filing procedure.[135] Additionally, the IRS considered its own administrative burden in differentiating between same-sex and opposite-sex couples, explaining that the change "fosters administrative

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[131] Rev. Rul. 2013-17, 2013-2 C.B. 201 ("[F]or Federal tax purposes, the terms 'husband and wife,' 'husband,' and 'wife' include an individual married to a person of the same sex if they were lawfully married in a state whose laws authorize the marriage of two individuals of the same sex, and the term 'marriage' includes such marriages of individuals of the same sex."). However, "[o]n October 23, 2015, Treasury and the IRS published proposed regulations that reflect the holdings of *Obergefell*, *Windsor*, and Rev. Rul. 2013-17, and that define terms in the Code describing the marital status of taxpayers." *See* I.R.S. Notice 2015-86, 2015-52 I.R.B. 887. The proposed regulation states, "[i]n light of the holdings of *Windsor* and *Obergefell*, the Treasury Department and the IRS have determined that, for federal tax purposes, marriages of couples of the same-sex should be treated the same as marriages of couples of the opposite-sex and that, for reasons set forth in Revenue Ruling 2013–17, terms indicating sex, such as 'husband,' 'wife,' and 'husband and wife,' should be interpreted in a neutral way to include same-sex spouses as well as opposite-sex spouses. Accordingly, these proposed regulations amend the current regulations under section 7701 of the Internal Revenue Code (Code) to provide that, for federal tax purposes, the terms 'spouse,' 'husband,' and 'wife' mean an individual lawfully married to another individual, and the term 'husband and wife' means two individuals lawfully married to each other. These definitions apply regardless of sex." *See* 80 Fed. Reg. 64378 (Oct. 23, 2015), https://www.irs.gov/irb/2015-45_IRB/ar09.html. This proposal, as of the date it is published as a final regulation in the Federal Registrar, will make Revenue Ruling 2013-17 obsolete. *Id.* Though, the proposal clarifies that "[t]axpayers may continue to rely on guidance related to the application of Revenue Ruling 2013–17 to employee benefit plans and the benefits provided under such plans, including Notice 2013–61, Notice 2014–37, Notice 2014–19, and Notice 2014–1." *Id.*; *see* discussion *infra* Part III.C.

[132] Rev. Rul. 2013-17, at 4.

[133] *Id.* at 5-9.

[134] *Id.* at 9.

[135] *Id.* at 5.

efficiency because the Service does not collect or maintain information on the gender of taxpayers and would have great difficulty administering a scheme that differentiated between same-sex and opposite-sex married couples."[136]

Consistent with the IRS and DOL's timely response to *Windsor*, many courts also quickly recognized the changing definition of "spouse."[137] In *Cozen O'Connor, P.C. v. Tobits*, the same-sex widow of a deceased law firm partner and the parents of the partner disputed who was entitled to the death payment of the partner under an ERISA-qualified plan.[138] In this action, the narrow issue was whether *Windsor* "requires recognition of a valid Canadian same-sex marriage for purposes of benefits distribution pursuant to ERISA."[139] Finding in favor of the surviving spouse, the Court held that "*Windsor* makes clear that where a state has recognized a marriage as valid, the United States Constitution requires that the federal laws and regulations of this country acknowledge that marriage."[140] Therefore, "where a state recognizes a party as a '[s]urviving [s]pouse,' the federal government must do the same with respect to ERISA benefits."[141]

C. "Spouse" in a Post-Obergefell World

In 2015, the Court held in *Obergefell v. Hodges* that same-sex couples may be married on the same terms as opposite-sex couples, thus requiring that states recognize same-sex marriages.[142] Post-*Obergefell*, the IRS and DOL have yet to release any official rules or amendments.[143]

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[136] *Id.* at 9.

[137] *See* Cozen O'Connor, P.C. v. Tobits, No. 11-0045, 2013 U.S. Dist. LEXIS 105507, at *19 (E.D. Pa. 2013).

[138] *Id.* at *4.

[139] *Id.* at *3.

[140] *Id.* at *20-21.

[141] *Id.* at *20.

[142] *Obergefell*, 135 S. Ct. at 2599 (2015).

[143] *See* TERESA RENAKER, NINA WASOW & JULIE WILENSKY, EMPLOYEE BENEFITS ISSUES AFFECTING EMPLOYEES IN SAME-SEX MARRIAGES, CIVIL UNIONS, AND DOMESTIC PARTNERSHIPS, 1-3 (2015), http://www.americanbar.org/content/dam/aba/events/real_property_trust_estate/annual_meeting/2015/RPTE%20Same-Sex%20Marriage_Employee%20Benefits%20Issues.authcheckdam.pdf (stating that the post-*Windsor* Guidance provided uniformity prior to *Obergefell* but it remains to be seen the issues that may arise Post-*Obergefell*). The author contends that "post-*Windsor* guidance from the IRS and Department of Labor on federal tax and employee benefit law...is likely to apply to most same-sex couples nationwide as to employee benefits matters that arise in the future." *Id.* at 1. However, the author points out that other "difficult transitional issues" include "how employee benefit plans will deal with participants in marriage-equivalent relationships

However, on December 9, 2015, the IRS issued Notice 2015-86 to "provide guidance on the application of *Obergefell*."[144] The IRS explained that because of the Post-*Windsor* guidance, like Revenue Ruling 2013-17 discussed above, which already recognized same-sex marriages for federal tax purposes, "the Treasury and IRS do not anticipate any *significant* impact from *Obergefell* on the application of federal tax law to employee benefit plans."[145] Although with respect to health or welfare plans, if a plan offers benefits to the spouse of a participant, *Obergefell* could change the operation of the plan to the extent that it effects the group of spouses qualified for coverage under the terms of the plan.[146] The IRS provided an example:

> [I]f the terms of a health or welfare plan provide that coverage is offered to the spouse of a participant as defined under applicable state law, and the plan administrator determines that applicable state law has expanded to include same-sex spouses as a result of *Obergefell*, then the terms of the plan would require coverage of same-sex spouses as of the date of the change in applicable state law.[147]

IV. ERISA PLANS AND SPOUSES, AND DISCRIMINATION UNDER TITLE VII

This section will discuss plans under The Employee Retirement Income Security Act of 1974 (ERISA) and sexual orientation discrimination under Title VII of the Civil Rights Act of 1964 (Title VII). It will conclude by briefly highlighting a discrimination statute proposed but not yet enacted by Congress, the Employment Non-Discrimination Act of 2013 (ENDA).

A. Plans Covered by ERISA

Whether or not federal law requires that an employer provide spousal benefits depends on whether the employer is characterized as a private

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created by the state prior to *Obergefell*, such as registered domestic partnerships and civil unions." *Id.*; *but see supra* note 118 and 119.

[144] I.R.S. Notice 2015-86, 2015-52 I.R.B. 887 (2015); *see also Windsor*, 133 S. Ct. at 2694.

[145] I.R.S. Notice, *supra* note 144, at 2 (emphasis added).

[146] *Id.* at 5.

[147] *Id.* at 6 (citing Public Law 88-352, 78 Stat. 241) (the Notice clarified that "[n]o inference should be drawn from this notice as to the application of any law other than federal law, including the application of any provisions of the Constitution of the United States or Title VII of the Civil Rights Act of 1964, to the treatment of same-sex spouses under employee benefits plans.")

employer (profit-making or nonprofit), governmental employer, or a church.[148] The provisions of ERISA do not apply to governmental plans and church plans; rather, the provisions of ERISA are generally thought to apply only to private institutions—both profit seeking and non-profit.[149] Federal law mandates that private employers provide the following plans to employees: retirement plans, health plans, dependent care assistance plans, and cafeteria plans.[150] This section will focus on those four plans and whether private employers are required to cover *spouses* under those plans covered by ERISA.[151]

1. Retirement Plans

Retirement plans cover qualified joint and survivor annuities (QJSA) and qualified preretirement survivor annuities (QPSA).[152] In the case of a married employee, an employer's pension plan must provide QJSA as the normal form of retirement benefits; however, this may be waived if both the employee and the employee's spouse consent.[153] In the event a married employee dies prior to retirement, an employer's pension plan must generally provide QPSA, and it is unlikely this benefit can be waived.[154]

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[148] 29 U.S.C. § 1003 (1974).

[149] *Id.*

[150] Carol V. Calhoun, *Employee benefits effects of Supreme Court same-sex marriage decision*, EMPLOYEE BENEFITS LEGAL RESOURCE SITE (July 14, 2015), http://benefitsattorney.com/employee-benefits-effects-of-supreme-court-same-sex-marriage-decision/.

[151] *See id.*

[152] *Id.* A QJSA is defined as "an annuity for the life of the participant with a survivor annuity for the life of the spouse." *See* 26 U.S.C. § 417 (1984) (b). And a QPSA is defined as "a survivor annuity for the life of the surviving spouse of the participant if the payments to the surviving spouse under such annuity are not less than the amounts which would be payable as a survivor annuity under the qualified joint and survivor annuity under the plan (or the actuarial equivalent thereof)." *See* 26 U.S.C. 417 § (1984) (c).

[153] Calhoun, *supra* note 150.

[154] *Id.* ("While it is theoretically possible for the qualified preretirement annuity to be waived by consent of the employee and spouse if the cost of such annuity is borne by the employee's pension benefit, in most instances a plan 'fully subsidizes' the qualified preretirement survivor annuity, and thus the benefit cannot be waived.").

2. *Health Plans*

Health Plans cover two major types of plans: defined benefits plans and defined contributions plans.[155] An employer is not required to provide either type of health plan to employee's spouses, but the employer may elect to cover spouses.[156] If an employer does not elect to provide spousal health benefits, the Affordable Care Act will *not* impose tax penalties on the employer.[157] However, if an employer elects to cover spouses, and the employee is terminated or the couple legally separates or divorces, then the spouse, who was previously covered by the employee's health insurance, is entitled to 36 months of health care continuation (COBRA) at the spouse's expense.[158]

3. *Dependent Care Assistance Plans*

Dependent Care Assistance Plans allow employees to set aside a part of their pre-tax wages in an account that can be used for employment-related expenses relating to dependent care services necessary to gainful employment.[159] They are separate written plans that an employer provides for the "exclusive benefit" of his employee so long as the employee meets a number of requirements.[160] Expenses the employee spends on his or her spouse may qualify if the spouse passes the qualifying person test;[161] however, employers are not required to provide benefits for qualifying spouses.[162] A spouse is considered a qualifying person if he or she "was not physically or mentally able to care for himself or herself and lived with [the employee] for more than half the year."[163] Thus, if an employee's spouse qualifies, an employer may, but is not required to, provide benefits for the spouse under a dependent care assistance plan.[164]

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[155] Calhoun, *supra* note 150; *see also* 26 U.S.C. 414 (1974); 26 U.S.C. 415 (1974); UNITED STATES DEPARTMENT OF LABOR: FREQUENTLY ASKED QUESTIONS ABOUT RETIREMENT PLANS AND ERISA (2015), http://www.dol.gov/ebsa/faqs/faq_compliance_pension.html.

[156] Calhoun, *supra* note 150.

[157] *Id.* (unlike, if the employer elected not to cover employees, in which case the ACA would impose tax penalties on the employer).

[158] *Id.*

[159] *See* I.R.C. § 129; *see also* Ellen Galinksy and James T. Bond, *Helping Families with Young Children Navigate Work and Family Life*, http://www.dol.gov/dol/aboutdol/history/herman/reports/futurework/conference/navigate/navigate.htm.

[160] I.R.C. § 129(d)(1) (1981).

[161] IRS Pub. 503, at 3 (Dec. 2, 2015), https://www.irs.gov/pub/irs-pdf/p503.pdf.

[162] Calhoun, *supra* note 150.

[163] IRS Pub. 503, *supra* note 161, at 3.

[164] Calhoun, *supra* note 150.

4. Cafeteria Plans

Cafeteria Plans are written employer fringe benefit plans that allow participating employees to choose among two or more benefits consisting of "cash" and "qualified benefits."[165] "A cafeteria plan may, but not is not required to, allow employees to change their elections mid-year based on certain qualifying events, including marriage and divorce."[166] A spouse cannot be an active participant in the plan, but the plan may provide benefits for the spouse.[167]

B. Title VII and Sex and Sexual Orientation Discrimination

ERISA does not itself prohibit discrimination in the disbursement of employee benefits; rather, such discrimination is prohibited by Title VII of the Civil Rights Act of 1964 (Title VII).[168] Under Title VII, it is unlawful for an employer to discriminate against any individual on the basis of "race, color, religion, sex or national origin."[169] Title VII applies to employers who have "fifteen or more employees."[170] The U.S. Equal Employment Opportunity Commission (EEOC) is the primary agency tasked with enforcing and interpreting Title VII.[171] Recently, the EEOC held that discrimination against an individual because of that individual's sexual orientation is discrimination because of sex and thus prohibited by Title VII.[172]

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[165] I.R.C. § 125(a) (1978); *see also Cafeteria Plans, Employee Fringe Benefits and COBRA*, 4, http://www.wickenslaw.com/wp-content/uploads/2012/10/Chapter-14-Cafeteria-Plans-Employee-Fringe-Benefits-and-COBRA.pdf (last visited Mar. 10, 2016); (however, "cafeteria plans may avoid being subject to ERISA if each substantive benefit in the cafeteria plan is a separate written plan satisfying ERISA" . . . . But "if the cafeteria plan is subject to ERISA, it must comply with ERISA.").

[166] Calhoun, *supra* note 150; *see also Cafeteria Plans, Employee Fringe Benefits and COBRA*, *supra* note 165, at 6 (citing 26 C.F.R. §1.125-4 (2016)).

[167] *Cafeteria Plans, Employee Fringe Benefits and COBRA*, *supra* note 165, at 5 (citing Prop. Reg. §1.125-1, Q. and A.-4).

[168] Roe v. Empire Blue Cross Blue Shield, 12-cv-04788 2014 U.S. Dist. LEXIS 61345, *15-16 (S.D.N.Y. May 1, 2014); *see also* Shaw v. Delta Air Lines, 463 U.S. 85, 91 (1983).

[169] 42 U.S.C. 2000-e2 (a)(1) (2012).

[170] 42 U.S.C. 2000e (b) (2012).

[171] 42 U.S.C. 2000e-5 (a) (2012); 42 U.S.C. 2000e-12(a) (2012).

[172] *See Baldwin v. Dep't of Transportation*, EEOC Appeal No. 120133080 (July 15, 2015), http://www.eeoc.gov/decisions/0120133080.pdf. The EEOC's latest interpretation of Title VII will likely have major implications for ERISA and whether employers may discriminate against employees on the basis of their spouse's sex.

Before the EEOC interpreted Title VII to prohibit sexual orientation discrimination, some courts were already beginning to treat sexual orientation discrimination claims as discrimination on the basis of sex—prohibited by Title VII.[173] In *Hall v. BNSF Ry. Co.*, two sets of spouses brought suit against their employers when the employers denied the couples spousal coverage because "its plan defined marriage as between one man and one woman and therefore provided coverage only for spouses of the opposite sex."[174] The employers moved to dismiss the Title VII claims, asserting that the spouses' discrimination claims were based on sexual orientation, not sex, which they claimed is not a cognizable claim under Title VII.[175] The court denied the employers' motion to dismiss, accepting the employees' view that they experienced adverse employment action based on sex because, had the employees been the opposite sex of their spouses, the spousal health benefits would not have been denied.[176]

Also consider *Cote v. Wal-Mart Stores East, LP,* in which the EEOC released a Final Determination on January 29, 2015.[177] Jacqueline Cote was an employee of Wal-Mart, which provided employees with health insurance benefits as a part of its compensation packages, with the option of providing qualified employees' spouses with health insurance coverage.[178] When Wal-Mart refused to add Cote's same-sex spouse to her health insurance coverage, Cote filed a complaint with the EEOC against Wal-Mart, alleging employment discrimination based on her sex in violation of Title VII.[179] The EEOC investigated the allegations and revealed that when Cote applied for spousal benefits, Walmart denied the benefit based on their policy that "individuals eligible for benefits had to be '[a] legal spouse of the opposite gender.' "[180] Although Wal-Mart amended its health benefits plan in 2014 to "to include same-sex spouses and domestic partners," the EEOC made a final determination that Wal-Mart violated Title VII because Cote was subject to "employment discrimination in that she was treated

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[173] *See, e.g.*, Hall v. BNSF Ry. Co., No. C13-2160 RSM, 2014 WL 4719007, at *3-4 (citing *In re* Levenson, 537 F.3d 925 (9th Cir.2009)) (holding employee's denial of benefits was based on his spouse's sex because if the employee had been the opposite sex of their spouse, the employee would have been able to add their spouse as a beneficiary).

[174] *Id.* at *1.

[175] *Id.* at *2.

[176] *Id.*

[177] *See* Re: Jacqueline A. Cote v. Wal-Mart Stores East, LP, No. 523-2014-00916 (EEOC Jan. 29, 2015) (final determination), https://www.glad.org/uploads/docs/cases/cote-v-walmart/cote-v-walmart-probable-cause-notice.pdf.

[178] *Id.*

[179] *Id.*

[180] *Id.* (quotations omitted).

differently and denied benefits because of her sex, since such coverage would be provided if she were a woman married to a man."[181]

C. Congressional Response to Sexual Orientation Discrimination

To alleviate concern over discrimination in the workplace based on sex and sexual orientation, the 113th Congress has also taken action. The Employment Non-Discrimination Act of 2013 (ENDA) was introduced into Congress by its drafters on April 25, 2013.[182] This Act garnered support for a period of time, but eventually several major gay-rights activists withdrew support when ENDA was drafted to include broad religious exemptions for employers.[183] In withdrawing support, the groups expressed fear that the religious exemption provisions might encourage for-profits to make objections similar to those advanced in *Hobby Lobby*.[184]

V. ANALYSIS

As discussed above, the Court held in *Hobby Lobby* that corporations are persons for purposes of the RFRA and thus afforded religious protection.[185] There are many arguments for and against this holding, but it is the Court's current position and must be accepted as true.[186] The *Hobby Lobby* majority clarified that the holding only applied to closely-held corporations[187] and would not permit discrimination in the workplace disguised as religious practice—at least not on the basis of race.[188] Justice Ginsburg dissented; the Justice disagreed with the Court's characterization of the decision as narrow, and instead, accused the majority of "venturing into a minefield."[189] This analysis will venture into *Hobby Lobby*'s minefield and determine whether closely held for-profit corporations could deny same-sex employees' spouses benefits under plans

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[181] *Id.*

[182] Employment Non-Discrimination Act of 2013, 113th Cong. S.815, § 6 (2013).

[183] *Id.* ("This Act shall not apply to a corporation, association, educational institution or institution of learning, or society that is exempt from the religious discrimination provisions of title VII of the Civil Rights Act of 1964 (42 U.S.C. 2000e et seq.) pursuant to section 702(a) or 703(e)(2) of such Act (42 U.S.C. 2000e–1(a), 2000e–2(e)(2)) (referred to in this section as a "religious employer"); *see also* Ed O'Keefe, *Gay rights groups withdraw support of ENDA after Hobby Lobby decision*, The Washington Post (July 8, 2014), https://www.washingtonpost.com/news/post-politics/wp/2014/07/08/gay-rights-group-withdrawing-support-of-enda-after-hobby-lobby-decision/.

[184] *Id.*

[185] Burwell v. Hobby Lobby, 134 S. Ct. 2751, 2769 (2014).

[186] *See* discussion *supra* Part II.C.

[187] *Burwell*, 134 S. Ct. at 2785.

[188] *Id.* at 2783.

[189] *Id.* at 2805 (Ginsburg, J., dissenting).

covered by ERISA by exercising their right to religious protection under the RFRA granted by *Hobby Lobby*.

A. The Assumption

Private employers are not required to provide benefits to employees' spouses under all plans covered by ERISA.[190] If a spousal benefit is not required by ERISA, a private employer enjoys the flexibility to elect to provide spouses with additional coverage.[191] If a private employer elects, but is not required, to provide spousal benefits under an ERISA plan, it is unclear whether ERISA or other laws will require that coverage be extended to both same-sex spouses and opposite-sex spouses on the same terms.[192] The answer to this question will largely hinge on how the Court addresses these issues with respect to employee benefits: Title VII;[193] Section 510 of ERISA;[194] and state nondiscrimination laws.[195]

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[190] *See* discussion *supra* Part IV.A. For example, a private employer must provide spouses with qualified joint and survivor annuities (QJSA) and qualified preretirement survivor annuities (QPSA), but does not have to provide spouses with health plans. *Id.*

[191] *Id.*

[192] When spousal benefits are mandated, an employer cannot discriminate because, after Obergefell v. Hodges, 135 S. Ct. 2584 (2015), "spouse" is defined under federal law as a gender neutral term. *See* discussion *supra* III B-C.

[193] Because providing employee benefits is a term and condition of employment, benefits cannot be provided in a way that violates Title VII, even if ERISA would not be violated. *See* discussion *supra* Part IV.B. Therefore, where an ERISA plan elects to include spouses, Title VII will require that the employer include all spouses, regardless of their sex. *Id.* This would be consistent with the Department of Labor's current interpretation of the word "spouse" and "marriage." *See* discussion *supra* Part III.B-C.

[194] Section 510 of ERISA is ERISA's anti-discrimination provision and it prohibits two types of employer actions. 29 U.S.C. §1140 (1974). First, it makes unlawful for employers to "discriminate against a participant or beneficiary for exercising any right to which he is entitled under the provisions of an employee benefit plan." *Id.* Second, it prohibits employers from taking adverse action to "[interfere] with the attainment of any right to which such participant may become entitled under the plan." *Id.* Therefore, Section 510 of ERISA does not cover discrimination in benefits; rather, it is more likely to address a situation in which an employer fires an employee in order to avoid providing that employee with benefits. *Id.* However, lower courts have varying interpretations of Section 510 of ERISA. *See Roe*, 2014 U.S. Dist. LEXIS 61345, at *9-15 (S.D.N.Y. May 1, 2014). One interpretation comes from the United States Court of Appeals for the First Circuit, holding in 1984 that Section 510's protections include "discriminatory modifications" to plans to intentionally benefit, or injure, certain identified employees or certain groups of employees. *Aronson v. Servus Rubber, Div. of Chromalloy*, 730 F.2d 12, 16 (1st Cir.1984), *cert. denied,* 469 U.S. 1017 (1984). This issue was denied certification by the Supreme Court, *Aronson v. Servus Rubber Div. of Chromalloy Am. Corp.*

Resolving those issues, assume that that the federal government has taken the position that the provisions of ERISA require that private employers who elect to provide spousal benefits must provide those benefits to opposite-sex spouses and same-sex spouses on the same terms; could an employer successfully challenge this requirement under the RFRA?

Emps.' Profit Sharing Plan, 469 U.S. 1017 (1984), but many courts from different jurisdictions still cite to this construction of Section 510 of ERISA with approval. *See, e.g.*, Vartanian v. Monsanto Co., 880 F.Supp. 63, 71 (D.Mass.1995); Fischer v. Philadelphia Elec. Co., C.A. NO. 90-8020, C.A. 91-2771 1992 U.S. Dist. LEXIS 11395, 66 (1992). A contradictory approach is Roe v. Empire Blue Cross Blue Shield. 12-cv-04788 2014 U.S. Dist. LEXIS 61345 (S.D.N.Y. May 1, 2014). In *Roe*, a same-sex couple challenged an employer's insurance plan because, although the plan did not define "spouse," the plan explicitly excluded same-sex spouses. *Id.* at *2 ("Same sex spouses and domestic partners are NOT covered under this plan."). Employees sought relief for "unlawfully and discriminatorily interfer[ing] with the attainment of benefits under Section 510 of ERISA." *Id.* at *1. The court dismissed the couple's claim, holding that because Section 510 of ERISA was not designed to prohibit discrimination—it defers to other federal laws that police discrimination—and the couple only asserted a discrimination claim under ERISA, the couple failed to state a claim for which relief could be granted. *Id.* at *17-18. So although Section 510 of ERISA does not currently prohibit discrimination on the basis of sexual orientation, it is possible that the Court could eventually hold that Section 510 of ERISA prohibits discrimination on the basis of sexual orientation with respect to the disbursement of employee benefits.

[195] State nondiscrimination laws might make differential treatment of same-sex and opposite-sex spouses unlawful, but those statutes might be preempted because of ERISA's preemption clause found in Section 514 of ERISA, which provides that "the provisions of this title and title IV shall supersede any and all State laws insofar as they...relate to any employee benefit plan." 29 U.S.C. § 1144(a) (1974). ERISA's preemption clause, however, does not result in complete preemption. *See id.* Section 514 of ERISA is limited by a number of exceptions, such as state laws regulating insurance, banking, and securities. 29 U.S.C. §1144(b)(2). The "savings clause" gives states the power to regulate ERISA plans indirectly by managing the terms of insurance policies, *see* RENAKER, *supra* note 143, at 19, and state nondiscrimination laws may prohibit discrimination on the basis of sexual orientation in the provision of insurance. *Id.* Also, ERISA is not to be construed to "alter, amend, modify, impair, or supersede" federal laws, like Title VII. 29 U.S.C. § 1144(d). Because complete preemption of state nondiscrimination laws would impair and modify Title VII by changing the means by which it is enforced, § 514 of ERISA requires partial preemption of state nondiscrimination laws—they are preempted to the extent that they prohibit more than Title VII prohibits. *See Shaw v. Delta Air Lines*, 463 U.S. 85, 101-105 (1983). The "deemer" clause, however, may limit the ability of state nondiscrimination law to reach self-insured employee benefit plans. A detailed analysis of ERISA preemption is beyond the scope of this note.

B. The Application

Under the RFRA, the government may substantially burden a person's exercise of religion only if it demonstrates that application of the burden to the person: "(1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest."[196] For-profit corporations, like natural persons and non-profits, are protected by the RFRA, and thus the Court's first step will be to determine whether requiring a closely held for-profit corporation to provide benefits to same-sex spouses would substantially burden the corporation's sincere beliefs.[197]

The *Hobby Lobby* majority stated that the RFRA only protects "sincere religious beliefs" but did not provide guidance as to what constitutes a "sincere belief;" instead, the decision seemed to indicate that the Court will defer to the RFRA claimant's judgment.[198] This may be a result of the Court's aversion to questioning the sincerity of religious beliefs.[199] Thus, to establish sincerity, some contend that all a closely held for-profit must do is "truthfully assert" that they understand their religious beliefs to disallow them from providing same-sex spouses with employee benefits.[200] For example, a for-profit may present evidence of membership in a church that teaches the sinfulness of same-sex relationships or simply the employer's demonstrated observance of that principal.[201] The government may

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[196] 42 U.S.C. § 2000bb-1(a) (2012).

[197] *See Hobby Lobby*, 134 S.Ct. at 2769-75, 2774, n.4; 42 U.S.C. § 2000bb-1(a) (2012).

[198] Frederick Gedicks, *Symposium: Adjudicating "substantial" burdens*, SCOTUSblog (Dec. 14, 2015, 4:06 PM), http://www.scotusblog.com/2015/12/symposium-adjudicating-substantial-burdens/.

[199] *See supra* P.II.A. (explaining the Court has repeatedly held that courts should not assess the plausibility of a claimant's religious beliefs).

[200] *See* Alex J. Luchenitser, *Symposium: Religious Accommodation in the Age of Civil Rights: A New Era of Inequality? Hobby Lobby and Religious Exemptions from Anti-Discrimination Laws*, 9 HARV. L. & POL'Y REV. 63, 71 (2015) ("[I]t appears that all a business's owners need to do is truthfully assert that they believe that their faith calls on them not to employ persons who have certain characteristics or engage in certain conduct.").

[201] Ira C. Lupu, *Moving Targets: Obergefell, Hobby Lobby, and the Future of LGBT Rights* 15 (GWU Law School Public Law Research, Paper No. 2015-15, 2015), http://scholarship.law.gwu.edu/cgi/viewcontent.cgi?article=2373&context=faculty_publications, 7 Ala. Civ. Rts. & Civ. Lib. L. Rev. 1 (forthcoming 2015); *see also* Douglas Laycock, *Religious Liberty and the Culture Wars*, 014 U. ILL. L. REV. 839, 849 (2014) (arguing the liberty interests of both sides of the "culture war" between supporters of gay rights and abortion and religious objectors). For those who view marriage as a religious relationship, as apposed to a legal or personal relationship, same-sex marriage defies church teaching. *Id.* Though some contend

challenge the sincerity of the for-profit's beliefs by submitting evidence that demonstrates the for-profit's prior acceptance of employees' same-sex spouses.[202] For example, invitations extended to same-sex spouses to office holiday parties, the for-profit's recognition of an employees' married name on tax returns or other official documents, a marriage announcement in the for-profit's company bulletin, or the for-profit's presentation of a wedding gift to an employee.[203]

Once the for-profit "truthfully asserts" the sincerity of its beliefs,[204] the employer next must establish that providing same-sex spouses with benefits is a substantial burden on that belief.[205] To show this is a substantial burden, the for-profit might argue that by requiring a religious believer to provide spousal benefits to same-sex spouses, the government is essentially forcing the religious believer to treat same-sex marriage as valid when the religious believer views same-sex marriage as invalid.[206] By forcing the employer with religious beliefs to recognize same-sex marriages, the for-profit is being denied the right to practice their faith.[207] Like *Hobby Lobby*, the Court might also consider any penalties associated

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employers will need to walk a fine line in establishing religious sincerity; employers will need to be careful to ensure that employees are respected and tolerated in the workplace, rather than harassed and name-called, as this would suggest bigoted animus rather than religious disapproval. Lupu, *supra* note 201, at 17.

[202] Lupu, *supra* note 201, at 17.

[203] *See id.* at 15-6.

[204] Lunchenister, *supra* note 200, at 71.

[205] *See* 42 U.S.C. § 2000bb-1(a) (2012).

[206] Laycock, *supra* note 201, at 848 ("The disagreement over marriage equality begins with a disagreement over the nature of marriage. Marriage is a personal relationship, a legal relationship, and a religious relationship. The secular side sees the legal relationship, or the committed personal relationship between the spouses, as primary. Committed religious believers see the religious relationship as primary. They see same-sex marriage legislation as the state interfering with the sacred, changing a religious institution. They reject the change, and they reject the state's authority to make the change.") (citations omitted).

[207] *See* Helen M. Alvare, *A "Bare Purpose to Harm?" Marriage and Catholic Conscience Post-Windsor* 1 (George Mason Law & Econ. Research, Paper No. 14-14, 2014), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2433741(arguing that marriage is central to the teachings of Christianity and Catholicism and refusing a religious exemption is equivalent of denying them the right to practice their faith or commanding they practice a new one). Also, the Court has previously rejected the argument that a law should be held unconstitutional because it makes the practice of religion more expensive. Braunfeld v. Brown 366 U.S. 599 (1961) (holding that Sunday closing laws were constitutional regardless of the fact that the laws made it more expense for Orthodox Jewish merchants who rested on Saturday to run their businesses).

with violating ERISA.[208] Ultimately though, because the Court has historically been unwilling to second-guess religious sincerity, the Court will likely accept the for-profit's assertion that this kind of complicity substantially burdens the for-profit's exercise of religious.[209]

C. Compelling Government Interest

Assuming the Court concludes that the provision substantially burdens the for-profit's sincere beliefs, the Court next must determine whether there is a compelling government interest in providing spouses with benefits, regardless of the sex of the employee's spouse.[210]

The Government would likely make the argument that there is a compelling government interest in nondiscrimination on the basis of sexual orientation.[211] Just as the *Windsor* majority relied on the eradication of discrimination as a justification for invalidating DOMA, so too could the Court in order to prohibit employers from discriminating against

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[208] ERISA violations may result in criminal violations and civil violations, but this is beyond the scope of this article. *See* U.S. DEP'T OF LABOR, ERISA ENFORCEMENT, http://www.dol.gov/ebsa/erisa_enforcement.html#2 (last visited Apr. 2, 2016).

[209] Lupu, *supra* note 201, at 17-8: *see also supra* P.II.A. (explaining the Court has repeatedly held that courts should not assess the plausibility of a claimant's religious beliefs).

[210] *See* 42 U.S.C. § 2000bb-1(a) (2012).

[211] Although, to the extent of the author, the Court has yet to conclude that nondiscrimination on the basis of sexual orientation is a compelling state interest, it is possible that the Court could accept this argument. *See* Luchenitser, *supra* note 200, 80-82. The *Hobby Lobby* majority repudiated the idea that its holding would protect "discrimination in hiring, for example on the basis of race," because "[t]he Government has a compelling interest in providing an equal opportunity to participate in the workforce without regard to race, and prohibitions on racial discrimination are precisely tailored to achieve that goal." Elizabeth Sepper, *Symposium: Gendering Corporate Conscience*, 38 HARV. J.L. & GENDER 193, 225 (2015) (citing *Hobby Lobby*, 134 S. C. at 2783). Justice Ginsburg's dissent pointed out the holes in the majority's opinion, fearing discrimination on the basis of religion, sex, sexual orientation, marital status, race; but the majority only addressed race discrimination. *Id.* "In doing so, the Court called into question whether the governmental has a compelling interest in preventing discrimination on any other basis." *Id.*; *see also Windsor*, 133 S. Ct. at 2693 ("[T]he Attorney General informed Congress that the President has concluded that given a number of factors, including a documented history of discrimination, classifications based on sexual orientation should be subject to a heightened standard of scrutiny.) (quotations omitted); Roberts v. United States Jaycees, 468 U.S. 609, 104 S. Ct. 3244 (1984) ("Acts of invidious discrimination in the distribution of publicly available goods, services, and other advantages cause unique evils that government has a compelling interest to prevent -- wholly apart from the point of view such conduct may transmit.")

employees' spouses on the basis of sexual orientation.[212] Borrowing from *Windsor*, the Government could argue that by permitting employers to discriminate against same-sex couples for purpose of employee benefits, society is effectively allowing employers to treat same-sex marriages as "second-class marriages."[213]

Further, by allowing the for-profit to discriminate on the basis of a spouse's sexual orientation, the same-sex couples who have been discriminated against will suffer unjustifiable harms, both financial and dignitary.[214] As discussed in *Windsor*, it could be argued that by denying benefits to same-sex spouses, the for-profit has insulted and violated the dignity of those employees' commitment to marriage and family life.[215] This resulting dignitary harm and financial harm would be suffered not only by the employees and their spouses, but also by any children or dependents of the same-sex couples.[216] The Court in *Obergefell* echoed this point finding that the harm inflicted upon same-sex parents is also suffered by the children who "suffer the stigma of knowing their families are somehow lesser."[217]

An anti-discrimination argument would also find support in the evolution of the Court's protection of civil equality and sexual freedom. First, there is *Romer v. Evans*, where in 1996 the Court invalidated a Colorado statute that denied homosexuals and bisexuals protection from discrimination because it was unconstitutional under the Equal Protection Clause of the Fourteenth Amendment.[218] And *Lawrence v. Texas*, where in 2003 the Court invalidated a Texas statute that made it a crime for same-sex couples to engage in sexual intercourse because the statute violated the Due

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[212] *Windsor*, 133 S. Ct. at 2682.

[213] *Id.* at 2693-95 ("[T]he primary goal and principal effect of the law was to make same-sex marriages second-class marriages.") (quotations omitted).

[214] *See* Louise Melling, *Symposium: Religious Refusals to Public Accommodation Laws: Four Reasons to Say No.*, 38 HARV. J.L. & GENDER 177, 189-90 (2015) (arguing that anti-discrimination laws are fundamental and public accommodations should not be denied on the basis of sexual orientation because the denial results in dignitary harm for the person who is turned away); *see also* Lupu, *supra* note 201, at 11-12 ("Accordingly, the constitutional permissibility of any accommodation of objecting employees will turn on whether the accommodation can be executed without material or dignitary harm to same sex couples."); *see also Windsor*, 133 S. Ct. at 2695 (2013) (finding Section 3 of DOMA brings financial harm to the families of same-sex couples because it raises the price of health care by taxing health benefits by employers to same same-sex spouses and denies or reduces survivor benefits, "benefits that are an integral part of family security") (citations omitted)

[215] *Windsor*, 133 S. Ct. at 2694-96.

[216] *Id.*

[217] Obergefell v. Hodges, 135 S. Ct. 2584, 2590 (2015).

[218] *See* Romer v. Evans, 517 U.S. 620 (1996).

Process Clause of the Fourteenth Amendment.[219] Next, in *United States v. Windsor,* as discussed above, the Court invalidated Section 3 of DOMA because it attached a stigma to same-sex couples, making it unconstitutional under the Equal Protection Clause of the Fourteenth Amendment.[220] And most recently, in *Obergefell v. Hodges,* the Court held that under the Due Process and Equal Protection Clauses of the Fourteenth Amendment, same-sex couples may be married on the same terms as opposite-sex couples.[221] This trend signifies a societal interest in affording those of all sexual orientations with equal rights and lends further support to the government's compelling interest in prohibiting discrimination on the basis of sexual orientation.

D. Least Restrictive Means

It is not enough that the government's provision serves a compelling government interest.[222] The Court must also determine whether the substantial burden is the least restrictive way of furthering that interest.[223] As the Court has previously noted, "[t]he least-restrictive means standard is exceptionally demanding."[224] For example, the *Hobby Lobby* Court advised that in some instances the government may need to incur additional expenses in order to accommodate a person's religious beliefs.[225] A private employer could argue that a less restrictive way for the government to achieve its interest would be for the government to provide benefits to those whose employer refuses to provide same-sex spousal benefits based on religious objection.[226] However, it can be surmised that due to the massive

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[219] *See* Lawrence v. Texas, 539 U.S. 558 (2003).
[220] *See* United States v. Windsor, 133 S. Ct. 2675 (2013).
[221] *See* Obergefell v. Hodges, 135 S. Ct. 2584 (2015).
[222] 42 U.S.C. § 2000bb-1(a) (2012).
[223] *Id.*
[224] Burwell v. Hobby Lobby, 134 S. Ct. 2751, 2780 (2014) (citing City of Boerne v. Flores, 521 U.S. 507, 532 (1997)).
[225] *See id.* at 2781 (citing 42 U.S.C. § 2000bb-3(c)) (2012) (RLUIPA: "[T]his chapter may require a government to incur expenses in its own operations to avoid imposing a substantial burden on religious exercise."). Religious Land Use and Institutionalized Persons Act of 2000 (RLUIPA) is the RFRA's sister statute. *Id.*
[226] *See id.*; *see also* Luchenitser, *supra* note 200, at 70 (explaining the *Hobby Lobby* decision) ("The opinion of the five-Justice majority suggested that an alternative means of satisfying the government's interest of guaranteeing access to contraceptives was for the government to pay for the contraceptive itself."). To the extent of the author's knowledge, an argument has not yet been made that an alternative to satisfying the government's interest would be for the government itself to pay for same-sex spousal benefit plans under ERISA; however, reading RLUIPA, the RFRA, and the *Hobby Lobby* majority, the author contends the Court might consider this less restrictive alternative in order to "avoid imposing a

financial burden this plan would place on the government, this proposition would likely be rejected.

Most importantly though, having the government provide benefits to those discriminated employees would not remedy the dignitary harm caused by the discrimination and thus would not serve the government's interest. Same-sex marriages would still be treated as "second-class marriages."[227] Same-sex couples would still suffer a dignitary harm from their employer's message that they are less worthy.[228] This harm would still affect their children, sending a message to the children of same-sex couples that their family is different than others—their parent is undeserving of receiving employee benefits because she is the same sex as her spouse.[229] The Court would likely find this unacceptable, and conclude that having the government provide same-sex spousal benefits would not be a less restrictive way of serving the government's compelling interest in eradicating sexual orientation discrimination.

Thus, it is likely the Court would ultimately hold that the private employer's argument under the RFRA fails. Although the Court would probably conclude that government's provision substantially burdens the for-profit's sincerely held beliefs, the Government has a compelling interest in preventing discrimination on the basis of sexual orientation and there is no less restrictive means available to serve that interest.

V. CONCLUSION

The Supreme Court's latest rulings regarding same-sex marriages have greatly effected the definition of "spouse" for purposes of federal law. With this change, it is unclear whether private employers will be required to provide benefits to same-sex spouses when they *elect* to cover spouses under plans covered by ERISA. If the federal government takes the position that the provisions of ERISA require that private employers who elect to provide spousal benefits must provide those benefits to opposite-sex spouses and same-sex spouses on the same terms, it is likely a for-profit corporation that strongly opposes same-sex marriage for religious purposes will challenge the provision under the Religious Freedom Restoration Act of 1993.[230] Though this article concludes that this claim would likely fail. Although the sincerity of the for-profits' beliefs would be accepted, the Court would likely conclude that the government's compelling interest in

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substantial burden on religious exercise." 42 U.S.C. § 2000bb-3(c); *see also Hobby Lobby*, 134 at 2781.

[227] *Windsor*, 133 S. Ct. at 2693-94.

[228] *See* sources cited *supra* note 218.

[229] *Windsor*, 133 S. Ct. at 2694-95; *see also Obergefell*, 135 S. Ct. at 2590 (2015).

[230] This article is skeptical of the Court's holding that corporations are persons for purposes of the RFRA, but accepts it for purposes of analysis.

prohibiting discrimination on the basis of sexual orientation and thus requiring private employers who provide spousal benefits under plans covered by ERISA to both same-sex couples and opposite-sex couples on the same terms could not be served by less restrictive means. Discriminating against spouses on the basis of sexual orientation inflicts harm on both same-sex couples and their children, and this harm cannot be justified by religious objection.